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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. [redacted] 92

ANTHONY J. DEBERNARDO

Petitioner,

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioner,

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WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia Circuit affirming a judgment of the United States District Court for the District of Columbia dismissing petitioner's complaint.

Opinions Below

The District Court entered no opinion. The opinion of the Court of Appeals is not yet reported and is set forth at page 17 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on March 27, 1958. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether an order of deportation may be upheld "because the facts were not in issue," without passing upon the question of the validity of the deportation hearing, when that proceeding has been challenged for want of due process and for failure to comply with the procedural requirements of the relevant statute.

2. Whether an alien's right to counsel in a deportation proceeding is an absolute right afforded him under the due process clause of the Fifth Amendment, or is a right to be determined by the rule of prejudicial error.

3. Whether, regardless of the standard to be applied, denial of counsel is not denial of due process where it appears that discretionary relief may have been available to the alien and complex issues of law were decided adversely to the alien.

4. Whether a penniless alien who has been in prison for twenty one years and is in confinement at the time of the deportation proceeding and who desires representation by counsel but who has been unable to obtain such representation because of indigency, his imprisonment, and lack of knowledge as to the availability of legal aid services, has been afforded the right to counsel and a due process hearing when he is merely advised that he has such a right, without more, when in fact such representation is obtained for aliens who are incompetent by reason of mental disability or youth.

5. Whether in the determination of questions of law in an administrative hearing, the lack of counsel is cured by legal representation during judicial review of the validity of the deportation order.

Statutes and Regulations Involved

Section 6 (a) of the Administrative Procedure Act, 5 U.S.C. 1005 (a) provides:

> "Except as otherwise provided in this Act any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding."

The Act of September 27, 1950, 64 Stat. 1044; 8 U.S.C. 155a, provides:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of 5, 7, and 8 of the Administrative Procedure Act."

8 Code of Federal Regulations 95.2 (1949 Edition) provides:

> (b)(3) "A party to a case may be represented by any reputable individual of good moral character, whether or not admitted to practice in accordance with Section 95.4, if such individual is appearing without monetary or other material remuneration and files a written declaration to that effect, and if such representation is permitted by the officer in charge of the office having consideration of the case under consideration, the Commissioner, or the Board."

8 Code of Federal Regulations 151.1 and 151.2(c) (1951 Edition) provides:

> 151.1 "After the alien has been taken into custody under a warrant of arrest and has been given a reasonable period of time to arrange for the presentation of his case, including, if desired, representation by counsel, the case of the alien shall be referred to an appropriate officer for hearing to determine whether the alien is subject to deportation . . . ."
>
> * * * * * * *
>
> 151.2(c) "At the commencement of the hearing under the warrant of arrest, the hearing officer shall . . . (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation . . . ."

Other Statutes

Section 242(b)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252(b)(2) provides:

> "The alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

Statement Of The Case

The petitioner, who came to the United States from Italy at the age of two years in 1912, had been ordered deported in 1932 upon the ground that he had committed two crimes involving moral turpitude, namely, third degree robbery and unlawful entry (R. 16, 17). In 1952 while the petitioner was in confinement at Clinton State Prison at Dannemora,

New York, the Board of Immigration Appeals vacated the warrant of deportation and reopened the proceedings for the specific purpose of determining whether the latter offense, unlawful entry was a crime involving moral turpitude (R. 32).

As defined subsequently by the Immigration Services's hearing officer, the issue to be resolved at the reopened hearing was:

> ". . . a determination whether the offense (unlawful entry) of which the respondent was convicted involves moral turpitude. Since the respondent was convicted of a lesser crime than for which he was indicted, we are faced with the legal problem of whether under the law governing criminal procedure in the State of New York, the court, in accepting a plea to a lesser degree of the crime charged, or one not necessarily included in the offense charged, must confine its consideration to the averments in the indictment which are pertinent to the lesser crime or its consideration limited to the statutory definitions of the lesser crime." (R. 15).

A reopened hearing was accorded to the petitioner on September 12, 1952, at Clinton State Prison. At that time the following colloquy took place: (R. 19, 20)

> Q. At this reopened hearing you have the right to be represented by counsel of your own choice and at your own expense, or by any other person duly qualified to practice before the Immigration and Naturalization Service. Do you wish to be so represented?
>
> A. Well, I do, but I have been a ward of the State over 21 years; I have no funds so far as retaining an attorney or getting legal advice from any nat-

uralization member who has practiced anything about naturalization laws.

Q. Do you desire to be represented at the reopened hearing?

A. I do, but there are things I don't know, like the law of 1917. I know I came in 1911. I don't know what the laws of 1917 are.

Q. The question is this, whether or not you want to proceed with the reopened hearing at this time without representation, or whether or not you desire to be represented by a counsel or by any other person duly qualified to represent you.

A. I would like to be represented by counsel because things in this proceeding I don't understand as far as Immigration laws. I would like this hearing postponed as I desire to be represented by counsel.

Q. You are informed that in view of the fact that you desire to be represented by counsel at the hearing your hearing is adjourned today to afford you an opportunity to obtain representation, with the understanding that when your reopened hearing date is set in the near future that the hearing will be proceeded with, with or without counsel.

Thereafter, on February 5, 1953, again at Clinton State Prison, the reopened hearing was conducted by the hearing officer. At that time, the following exchange took place: (R. 20, 21)

Q. Have you obtained counsel?

A. I had a visit here on September 27 and 28 of 1952 and told my family. They cannot retain counsel, they have no money.

Q. Are you ready and willing to proceed with the reopened hearing at this time without representation?

A. Well, I have no counsel.

Whereupon, the hearing officer proceeded to interrogate the petitioner without further discussion of representation by counsel or other qualified persons, or any statement by appellant that he was willing to waive representation by counsel, or advice to appellant by the hearing officer that services of counsel may be had by indigents without cost by legal aid or other organizations.

During the course of the hearing, an additional charge was lodged against the petitioner. At this time the hearing officer stated: (R. 29)

> Q. You are advised that should you desire to obtain an attorney or other qualified person to represent you on this charge, permission for the continuance of the hearing will be granted. Do you desire representation?
>
> A. From the start, on September 12, I stated I would like a counsel. However, I received a visit here in September and I explained to my people. They have no funds to retain a counsel for me. I have no funds to retain a counsel for me. Being as you wanted to go ahead with the hearing whether I had representation or not, I am going ahead with the hearing."

Whereupon the hearing proceeded until its close.

On February 25, 1953, an order of deportation was entered against the petitioner upon the basis of the reopened hearing held on February 5, 1953. Thereafter, the petitioner without counsel, appealed from the order of deportation to the Board of Immigration Appeals. At the hearing before the Board, the petitioner's sister, not an attorney or representative of a social service organization regularly engaged in such activity, appeared before

the Board and "pleaded the sympathetic feature that the alien's family were all in the United States and that his deportation would necessarily have to be to a country where he has no family since he has been in this country since he was two years of age." (R. 3, 4, 6, 31) No argument was made to the Board upon the legal issues presented in the hearing. (R. 31)

The Board of Immigration Appeals dismissed the appeal from the order of deportation on July 2, 1953. (R. 31) In April, 1955, after the Immigration Service ordered petitioner to surrender for deportation, an action was brought in the District Court for judgment, declaring that the order of deportation was void in that it is based upon hearings in which the petitioner was deprived of the assistance of counsel. (R. 4) The trial court, instead, entered judgment for the defendant below on February 1, 1957. (R. 10, 11, 12)

On appeal, the District of Columbia Circuit affirmed. It ruled that "it is unnecessary to decide whether due process requires that counsel be appointed to represent an indigent defendant in a deportation proceeding, because the facts on which deportation was ordered . . . were not in issue" and as to the question of law, that it "was an issue before the District Court . . . in which (petitioner) was ably represented by an attorney (and that) he was therefore not prejudiced as to that question by being unrepresented at the administrative hearings." (Appendix p. 18).

Reasons For Granting The Writ

The decision of the Court below poses disturbing and profound implications which concern the scope of judicial review of deportation orders, the effect of the deprivation of the right to counsel in deportation and other administrative hearings, and the nature of judicial review of questions of law decided by administrative agencies.

1. The Court's ruling that it need not decide the challenge of the deportation hearing for lack of due process because the "facts upon which deportation was ordered . . . were not in issue" strikes at one of the fundaments of judicial review of deportation orders. Since the historic Japanese Immigrant Case *(Yamataya* v. *Fisher)*, 189 U. S. 86, 100, failure of administrative officers to conform to the "principles that inhere in 'due process of law'" has consistently been held to be a basis for challenging the validity of a deportation order apart from the issues of fact upon which the deportation is based. *Chin Yow* v. *United States*, 208 U. S. 8; *Giegow* v. *Uhl*, 239 U. S. 3, 9; *United States ex rel. Mensevitch* v. *Tod*, 264 U. S. 134; *Vajtauer* v. *Commissioner*, 273 U. S. 103; *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 335-336; *Kessler* v. *Strecker*, 307 U. S. 22; *Sung* v. *McGrath*, 339 U. S. 33; *Chew* v. *Colding*, 344 U. S. 590; *Shaughnessy* v. *Mezei*, 345 U. S. 206.

As Justice Brandeis observed in his celebrated concurring opinion in *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 73: "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings . . . are correct but . . . (inter alia) . . . that the procedure at the hearing shall be consistent with the essentials of a fair trial. . . ."

What the Court below failed to perceive is that a challenge of the deportation proceeding for lack of due process goes to the very jurisdiction and competence of the executive to deport. *Gonzalez* v. *Williams*, 192 U.S. 1, 15. See also *Frank* v. *Mangum*, 237 U. S. 309; *Moore* v. *Dempsey*, 261 U. S. 86; *Morgan* v. *United States*, 304 U. S. 1, 22.

The ruling below, petitioner believes, is thus in sharp conflict with the settled decisions of this Court. If unreviewed, it may well vitiate the basis for judicial review of any orders of deportation which are being tested for failure to comply with due process requirements.

2. By its ruling, the Court below makes the right to counsel in deportation proceedings depend upon a conflict upon issues of fact presumably limiting the possibility of prejudicial error to this area. (See Note, 97 Univerity of Pennsylvania Law Rev. 855).

A. The initial question posed here is whether this criterion, which may obtain for the purpose of the due process clause of the Fourteenth Amendment, applies to the due process clause of the Fifth Amendment which controls the present proceedings. See *Adamson* v. *California*, 332 U. S. 46; *Bute* v. *Illinois*, 333 U. S. 640, footnote 13 at 657, citing *Palko* v. *Connecticut*, 302 U. S. 319, 323, 324. The issues which divided this Court *In Re Groban*, 352 U. S. 330 are not present here. But the issue which brought that case to this Court—the right to counsel in administrative hearings—is one of obvious importance to the federal regulatory agencies. The nature of that right—whether it turns upon a rule of prejudicial error, *Betts* v. *Brady*, 316 U. S. 455, or whether "the guiding hand of counsel at every step of the proceedings" *Powell* v. *Alabama*, 287 U. S. 45, 69, is an absolute right of due process—is an issue which requires resolution by this Court.

The issue is particularly important in deportation proceedings, such as the petitioner's. For the assumption of

the Court below that the "guiding hand of counsel" in the administrative hearing is limited to development of factual issues is erroneous. Apart from the technical yet essential questions of procedure and questions of law (which unless raised administratively may be lost for judicial review), there are questions of eligibility for various forms of discretionary relief which may never come to the threshold of a reviewing court. *Handlovits* v. *Adcock*, 80 F. Supp. 425 (E.D. Mich.) *United States ex rel. Castro-Louzan* v. *Zimmerman*, 94 F. Supp. 22, 28 (E. D. Pa.). The petitioner here, a resident of the United States since infancy whose offenses all precede his 21st birthday, for example, might have been able to obtain a stay of deportation proceedings in order to apply for pardons for his deportable offenses. Such pardons would have rendered him immune from deportation, Second proviso Section 19, 2nd Act of Feb. 5, 1917, 8 U. S. C. 155. See also Public Law 85-316, 85th Congress, 71 Stat. 639, which permits such an alien,[1] upon application for re-entry to the United States to secure a waiver of grounds of excludability.

B. A further question is the nature of the protection which the due process clause affords to indigents in federal administrative proceedings, particularly those involving deportation. The Court below, as we have suggested above, erroneously failed to reach that question. The relevant statute in the present case is the Administrative Procedure Act, 5 U. S. C. 1001, which provides at section 6, that he shall be accorded the right to be represented by counsel. Cf. Act of September 27, 1950, 64 Stat. 1044, 8 U. S. C. 155a. A similar provision appears at Section 242 (b) (2) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252 (b) (2). Whether that right is merely the right to be advised of the right to counsel, which

[1] The alien must be the spouse, as is the petitioner, of a citizen or of an alien admitted for permanent residence.

is the interpretation of the Immigration and Naturalization Service, or whether it contemplates actual representation for indigent aliens,[2] absent waiver, is a question of no less importance in deportation proceedings in which a person may be banished for life, than it is in federal or state criminal proceedings in which imprisonment may be merely for a short term. Cf. *Johnson* v. *Herbst*, 304 U. S. 458; *Griffin* v. *Illinois*, 351 U. S. 12; 18 U. S. C. 3005; Federal Rules of Criminal Procedure, Rule 44.

This Court has previously recognized the importance of a related issue in *Hyun* v. *Landon*, 219 F. 2d 404, (9 Cir.), affirmed by an equally divided court, 350 U. S. 990, reh. denied, 351 U. S. 928. There the issue was the use of ex parte depositions in a deportation proceeding in which the alien had been denied transportation to confront the deponent. Needless to say, the issue here is not less important to the conduct of a fair hearing.

3. A final problem of fundamental concern to the judiciary and to federal administrative agencies is posed by the District of Columbia Circuit's ruling that as to questions of law, lack of counsel administratively is cured by representation during judicial review of the issue.

Apart from the question whether such a hearing is void for want of due process and for failure to comply with the statutory requirements and therefore not susceptible to cure by subsequent judicial review, the decision below, petitioner believes, is in conflict with the many decisions of this Court regarding the nature of judicial review of administrative actions.

As early as 1904, this Court held in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, that as to questions of law the ad-

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[2] As to mental incompetents and persons under age 16, the Immigration Service secures actual representation by requiring that "arrangements . . . be made for a representative of a social service or similar agency to be present." Immigration Manual, P. 7063.

ministrative ruling "will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing." (at 109, 110)

This view has been reaffirmed repeatedly. See *Smith* v. *Hitchcock*, 226 U. S. 53, 58: ". . . We should not interfere with the decisions (of administrative agencies as to a question of law) unless clearly of the opinion that it was wrong." *N. L. R. B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130, 131: "Questions of statutory interpretation . . . are for the courts to resolve giving affirmative weight to the judgment of those whose special duty is to administer the questioned statute," and will be disturbed only if they lack "any rational and statutory foundation." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 207.

This rule has been specifically applied to deportation proceedings. In *Kessler* v. *Strecker*, supra, at 34, this Court held that a decision of the Circuit Court to remand the case for a "de novo hearing" was error because "the proceeding for deportation is *administrative*." (Italics supplied).

The ruling below that the petitioner was not prejudiced by lack of counsel in his deportation proceeding seems manifestly in error in view of the rulings in the foregoing cases. If the reviewing court does not sit de novo upon the issue of deportation of aliens, if "affirmative weight" is to be given to the administrative decisions on questions of law; if those decisions may be set aside only if "clearly wrong" and lacking in "any rational and statutory foundation," it can scarcely be maintained that the petitioner was not prejudiced when his challenge of the legal question was presented only to a reviewing court.

The prejudice which the petitioner suffered is highlighted by the nature of the issue decided by the adminis-

trative agency. It was whether the petitioner's conviction of the offense of unlawful entry, when he was 17 years old, involved moral turpitude in view of the fact that he was convicted of a lesser crime than the one for which he was indicted. The Immigration Service was required to determine

> "whether under the law governing criminal procedure in the State of New York, the court in accepting a plea to a lesser degree of the crime charged, or one not necessarily included in the offense charged, must confine its consideration to the averments of the indictment which are pertinent to the lesser crime or . . . to the statutory definitions of the lesser crime." (R. 15)

The very statement of the issue determined demonstrates the need which the petitioner had for counsel at his deportation hearing. See also *Tutrone* v. *Shaughnessy*, 26 L.W. 2517 (April 22, 1958), in which the United States District Court for the Southern District of New York held that a first offense conviction of petty larceny by a 17-year-old boy is not for a crime involving moral turpitude, even though conviction occurred before New York's "Youthful Offender Act", which bars marking such offenders as "criminals."

The ruling of the Court below assumes especial importance because it was made by the District of Columbia Circuit. The very volume of federal administrative decisions which come before that Court underscores the impact which the decision below might have unless reviewed by this Court.

Conclusion

The questions presented here regarding the basis of judicial review of deportation orders, the effect of lack of counsel in a federal administrative hearing, the nature of the right to counsel which is afforded to an indigent alien in a deportation proceedings, and the role of the judiciary in determining questions of law which have been decided by administrative agencies each are of such importance as to warrant review of the decision below by this Court. For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

JACK WASSERMAN;
DAVID CARLINER.

SANTANGELO, MORRISON AND MARTORANO,
WASSERMAN AND CARLINER.

Of Counsel.

OPINION

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* Anthony J. DeBernardo, a native of Italy, was brought by his parents to the United States when he was two years old, arriving in New York June 15, 1912. Admitted then to permanent residence, he has lived in this country continuously since that time.

When he was scarcely more than 21 DeBernardo had been twice sentenced to imprisonment for criminal offenses by New York state courts: in 1927, to a term of not more than three years on a plea of guilty to unlawful entry; and in 1931, to a term of 15 years for armed robbery.

In February, 1932, a warrant of arrest for deportation was issued by the Assistant Secretary of Labor charging appellant was deportable under § 19 of the Immigration Act of 1917 in that he had been sentenced to imprisonment more than once for a term of one year or more for crimes involving moral turpitude committed after his entry into the United States. Pursuant to a hearing at Sing Sing Prison, a deportation order was entered May 12, 1932, but deportation was deferred until DeBernardo should be released from imprisonment. Later in 1932 he escaped from Sing Sing but was soon recaptured; and on September 4 of that year was sentenced to an additional term of 15 years for robbery committed during the brief time he was at large.

July 30, 1952, the Board of Immigration Appeals vacated the deportation order entered in 1932 and reopened the hearing for the receipt of evidence as to whether under New York law unlawful entry involves moral turpitude. The reopened hearing began September 12, 1952, but was immediately recessed so DeBernardo could obtain counsel. When the reopened hearing was reconvened Feb-

ruary 5, 1953, nearly five months later, appellant advised the hearing officer that neither he nor his family had money with which to retain counsel, so that he was still unrepresented. The hearing nevertheless proceeded, and during the course of it another charge was lodged against the appellant based on his robbery conviction in 1932, following his escape from Sing Sing. February 25, 1953, an order of deportation was entered which was affirmed by the Board of Immigration Appeals July 2 of that year.

DeBernardo's subsequent suit against the Attorney General for a declaratory judgment was decided adversely to him by the District Court. He appeals, principally on the ground that he was denied due process when he was not provided with counsel at the deportation hearings.

It is unnecessary to decide whether due process requires that counsel be appointed to represent an indigent defendant in a deportation proceeding, because the facts on which deportation was ordered in this case were not in issue. At the administrative hearings appellant admitted having been sentenced more than once to terms exceeding one year, and copies of the indictments, judgments and sentences were received in evidence. *Sumio Madokoro* v. *Del Guercio*, 160 F. (2d) 164 (9th Cir. 1947); *Dengeleski* v. *Tillinghast*, 65 F. (2d) 440 (1st Cir. 1933). The legal question whether the crime of unlawful entry involves moral turpitude was an issue before the District Court in the declaratory judgment suit in which DeBenardo was ably represented by an attorney. He was therefore not prejudiced as to that question by being unrepresented at the administrative hearings. *United States ex rel. Wiczynski* v. *Shaughnessy*, 185 F. (2d) 347 (2nd Cir. 1950). The District Court's decision that the crime involves moral turpitude was correct. *United States ex rel. Meyer* v. *Day*, 54 F. (2d) 336 (2nd Cir. 1931); *United States ex rel. Sirtie* v. *Commissioner of Immigration*, 6 F. (2d) 233 (D. C. N. Y. 1925).

As the sentences imposed in 1927 and 1931 were sufficient to sustain the deportation order, we do not reach the question whether a third sentence was properly added at the 1953 hearing.

Affirmed.

JANUARY TERM, 1958

No. 13,767

ANTHONY J. DEBERNARDO, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: PRETTYMAN, WILBUR K. MILLER, and BASTIAN, Circuit Judges.

C. A. 1636-55

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: March 27, 1958.

Per Circuit Judge WILBUR K. MILLER.